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No. 97-775

In The

Supreme Court of the United States

October Term, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

ABBOTT LABORATORIES, *et al.*,

Petitioners,

vs.

ROBERT A. HUGGINS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition fails to identify the following parties, who were appellants in the court of appeals: Paul Cady and Kenneth Karofsky.

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APPENDIX

Appendix A — Excepts from *Rivet* Petition 1a

STATEMENT OF JURISDICTION

The district court lacked subject matter jurisdiction. The court of appeals exercised appellate jurisdiction pursuant to 28 U.S.C. § 1292(b). The court of appeals denied Petitioners' petition for rehearing on October 8, 1997. This Court has discretionary jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition for writ of certiorari was timely filed under 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

A. The Procedural History of This Case

On January 26, 1996, Respondent Robert A. Huggins filed a complaint in the Circuit Court of Clarke County, Alabama on behalf of himself and a class of consumers who, during the period 1991 to the filing of the complaint, purchased brand name prescription drugs manufactured by Petitioners from independent retail pharmacies in Alabama and other states (and the District of Columbia) that have antitrust statutes that permit damages actions by indirect purchasers. *Huggins* Complaint ¶ 47 (App. 84a). The complaint alleges that beginning before May 1990 Petitioners conspired to fix prices of brand name prescription drugs. *Huggins* Complaint ¶ 75 (App. 91a). The complaint seeks recovery solely under state antitrust law. *Huggins* Complaint ¶¶ 1, 3, 4, 81 (App. 74a, 75a, 93a). No claim is made under the federal antitrust laws (or any other federal law) because, as an indirect purchaser, Huggins cannot obtain relief under the federal antitrust laws. *Huggins* Complaint ¶ 3 (App. 75a).

On February 29, 1996, Petitioners removed the case to the United States District Court for the Southern District of Alabama, asserting both diversity and federal question jurisdiction. On March 11, 1997, Respondent moved the

Alabama district court to remand the case to state court. While the remand motion was pending, the Judicial Panel on Multidistrict Litigation, on March 13, 1996, entered a conditional order to transfer this case under 28 U.S.C. § 1407 to the Northern District of Illinois. Over Respondent's opposition, the case was transferred by the Panel on June 5, 1996 for consolidation with the other cases pending in *In re Brand Name Prescription Drugs Antitrust Litigation*, MDL No. 997.

On July 31, 1996, Respondent filed a remand motion in the transferee court, which denied the motion on October 1, 1996 ("Oct. 1 Order"). With respect to federal question jurisdiction, the district court concluded, based on the artful pleading doctrine, that, even though Respondent brought this case under state antitrust law, Respondent had really pled a federal antitrust claim. The district court reasoned that Respondent's claim arose from Petitioners' interstate anticompetitive activity, and that the federal antitrust laws, but not the Alabama antitrust laws, provide redress for such interstate activity. Oct. 1 Order (App. 56a-59a). The court did not discuss, much less accept, Petitioners' argument that Respondent had engaged in artful pleading by attempting to avoid the allegedly preclusive effect of an order denying class certification in another case.

Pursuant to 28 U.S.C. § 1292(b), Respondent moved the district court for leave to appeal the October 1 order immediately. In an order dated December 16, 1996, the district court granted the motion with respect to, *inter alia*, the federal question jurisdiction issue. The Seventh Circuit granted Respondent's § 1292(b) petition on May 7, 1997 and on August 15, 1997 reversed in a unanimous opinion by Chief Judge Posner.

B. The Procedural History of the *Price* Case

Before this case was commenced, William Price and Jennifer and Neal Jackson filed a class action complaint in the

Circuit Court of Barbour County, Alabama on behalf of consumers who purchased certain brand name prescription drugs from retail pharmacies in Alabama. *Price v. American Home Products, et al.*, 94 C 897 (N.D. Ill.) ("*Price*"). Like this case, *Price* was brought solely under state antitrust law against certain drug manufacturers for price fixing. Unlike this case, *Price* alleges a conspiracy of no specified time period and limits the class to purchasers from Alabama retail pharmacies during the two years preceding the filing of the lawsuit. None of the counsel that filed the *Price* complaint is on the *Huggins* complaint. *Compare Huggins* Complaint, signature page (App. 94a) *with Price* Complaint, signature page (App. 106a).

The defendants in *Price*, which are seven of the Petitioners in this case, removed the case to a federal district court in Alabama solely on the ground of diversity jurisdiction. *See* February 7, 1995 Memorandum Opinion ("Feb. 7 Opinion") (App. 113a). The *Price* defendants *did not assert federal question jurisdiction, even though, as they now trumpet in this Court, Price is based on the very same interstate conspiracy alleged in this case. See Huggins* Petition for Writ of Certiorari at 5 ("The allegations in the *Huggins* Complaint are virtually identical to those in *Price*"). Petitioners are now requesting this Court to find the issue of federal question jurisdiction worthy of review in this case, when seven of them did not find such jurisdiction worthy of asserting in their removal petition in *Price*. Petitioners offer no explanation for their failure in *Price* to even advance federal question jurisdiction as a basis for removal.

After removal to federal court, *Price* was transferred to the Northern District of Illinois and became a part of the MDL proceedings there. The district court there denied the *Price* plaintiffs' class certification motion on November 15, 1994 ("Nov. 15, 1994 Order"). The court found that the plaintiffs had "failed to demonstrate" that common questions predominated or that a class action was the superior method for deciding the

controversy. Nov. 15 Order (App. 127a). According to the district court, "tracing the alleged overcharges from manufacturers, to wholesalers, to retailers, to consumers present[ed] individualized issues which would dominate th[e] litigation." *Id.* (App. 128a). The district court did not rule out the possibility that the passing-on of overcharges could be proved in a manner that would not cause individual issues to predominate. The court simply ruled that the *Price* plaintiffs had not done so.

After their class motion was denied, the *Price* plaintiffs moved to dismiss their action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. They argued that diversity jurisdiction was absent because the amount in controversy did not exceed the requisite $50,000. The district court acknowledged that the argument "might have had merit had the plaintiffs immediately objected to removal." Feb. 7 Opinion (App. 114a). Nonetheless, the court held that "by not contesting removal when the motion was originally made, the plaintiffs conceded that their claims exceeded the $50,000 amount. . . ." *Id.* (App. 115a). *Price* remains pending in the district court; no judgment has been entered on any claim in that case.

C. The Issue Before This Court in *Rivet*

In *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir.), *cert. granted*, __ U.S. __, 118 S. Ct. 31 (1997), the plaintiffs filed claims under Louisiana law to have their rights under a second mortgage recognized and enforced or, alternatively, to recover damages. 108 F.3d at 582. The defendants removed the case to federal court on the ground of federal question jurisdiction. *Id.* It was undisputed that the plaintiffs could not have stated a federal claim to enforce their alleged rights under the mortgage. The Fifth Circuit, over the dissent of Judge Jones, upheld the district court's assertion of federal question jurisdiction based on the artful pleading

doctrine. The majority concluded that the plaintiffs had engaged in artful pleading because their state law claims were barred by the res judicata effect of a federal bankruptcy court order canceling their mortgage. *Id.* at 586.

Judge Jones dissented because in her view the majority had read footnote 2 of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) too broadly. She would have limited artful pleading under *Moitie* to a situation where a plaintiff unsuccessfully pursues a federal claim in federal court and then, based on the same facts, files a state law claim in state court. Because the plaintiffs had not filed any claim in the bankruptcy proceeding and could not have stated a federal claim based on the facts underlying their state law claim, Judge Jones dissented. *Id.* at 593-94. She criticized the majority for holding that "a *conceivable federal claim is not necessary for removal*, as long as there is a federal defense of res judicata based on a federal judgment," *id.* at 595 (emphasis in original), and concluded that

> [t]o say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine.

Id.

The issue before this Court in *Rivet* is whether, in an action brought in state court under state law, removal jurisdiction can rest on the preclusive effect of a prior federal judgment even though the state-court plaintiff did not file a federal claim in the federal action and has no conceivable federal claim. Excerpts from *Rivet* Petition for Writ of Certiorari (R. App. 3a). Thus, whether this Court affirms or reverses in *Rivet* will have no bearing on the proper disposition of this case. *Rivet* requires this Court to decide the precise scope of the res judicata form

of artful pleading. There is no dispute in *Rivet*, however, that an essential element of that type of artful pleading, whatever its proper scope, is a federal judgment. Here, it is undisputed there is no judgment in *Price* or any other federal case that could be res judicata in this lawsuit. No reason exists, therefore, to grant *certiorari* and vacate the decision below for further consideration in light of *Rivet*.

D. The Seventh Circuit's Decision

The Seventh Circuit extensively analyzed the artful pleading doctrine on which the district court had relied in purporting to exercise federal question jurisdiction over this case. The circuit court observed that

> [t]he doctrine is usually taken to mean that if federal law has so far occupied a field of disputes as to extinguish any basis in state law for seeking a resolution of the dispute, a plaintiff cannot prevent removal by casting his claim as one under state law — it must actually be a claim under federal law because only federal law could supply a ground for relief.

In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 611 (7th Cir. 1997) (App. 18a). The court then stated that the doctrine was difficult to confine within reasonable limits because of the "countless cases in which a suit under state law could be thought to be a federal suit in state clothing," *id.* (App. 19a), and noted that Petitioners were arguing that

> *any* time an antitrust plaintiff brings a suit in state court under a state antitrust statute that contains substantive provisions similar to that of a federal antitrust statute, the defendant can remove on the

> ground that the plaintiff is trying to bring a federal antitrust suit yet to insulate it from removal to a federal court.

Id. (App. 19a-20a) (emphasis in original).

In rejecting Petitioners' argument, the court of appeals carefully considered *Moitie*'s footnote 2. The court noted that the plaintiffs in *Moitie* had engaged in artful pleading by "trying to dodge a federal court's judgment," *id.* at 612 (App. 21a), and, contrary to Petitioners' suggestion that the Seventh Circuit gave the case no meaning, interpreted *Moitie* to mean that

> if the sole basis for filing a state suit is to get around, however temporarily and hopelessly, a federal judgment, it can be argued that the new "state law" suit is really the old federal suit in a transparent guise and that the federal court ought to say so in order to get rid of it quickly and thus protect the federal judgment against the possibility that the state court might abet the plaintiff's effort to get around a dispositive defense or other fatal flaw in his federal case.

Id. (App. 21a). The Seventh Circuit pointed out that here, in contrast to *Moitie*, there was no federal judgment for Respondent to avoid. The court acknowledged that the class motion in *Price* had been denied, but found that immaterial because "the denial of class certification is not a final judgment, terminating the underlying suit; the suit continues, only as an individual action rather than as a class action." *Id.* (App. 21a).

Next, the court considered Petitioners' argument that Respondent had engaged in artful pleading by attempting to obtain relief under the Alabama antitrust statute for an interstate

conspiracy. The court disagreed with Petitioners that an interstate conspiracy could only be redressed under federal antitrust law, interpreting the Alabama statute to reach unlawful transactions in interstate commerce. *Id.* at 612-13 (App. 22a-23a).

Finally, the court of appeals stated that *Moitie*'s footnote 2 should be narrowly construed, reasoning as follows:

> The twist that *Moitie* gave to the [artful pleading] doctrine is (very uncharacteristically for its author, Justice, now Chief Justice, Rehnquist) based on distrust of state courts, and, especially since it appears only in a footnote, should be narrowly construed in the interest of maintaining comity between the federal government and the states and keeping federal jurisdiction within the limits prescribed by Congress.

Id. at 613 (App. 23a).

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

Petitioners ask this Court to decide whether this case, brought solely under state law, presents a federal question for purposes of 28 U.S.C. § 1331. Petitioners argue that Respondent's state antitrust claim actually arises under federal law: (1) because of the allegedly preclusive effect of a federal court procedural ruling in another case; and (2) because Respondent has alleged facts that can only state a federal antitrust claim. Petitioners assert that their petition should be granted because these two issues, in conjunction with those presented in *Rivet*, would permit this Court to fully clarify the meaning of *Moitie*'s footnote 2.

The petition should be denied, however, because no court of appeals has interpreted *Moitie*'s footnote 2 to support either of Petitioners' arguments. The four circuits that have addressed footnote 2 have all interpreted it far more narrowly than do Petitioners. In addition, the petition should be denied because Petitioners give no reason worthy of Supreme Court review for interpreting footnote 2 far more expansively than any of these four appellate courts. To the contrary, there are compelling reasons, discussed below, not to accept Petitioners' invitation to greatly expand the artful pleading doctrine.

II.

PETITIONERS' COLLATERAL ESTOPPEL VERSION OF ARTFUL PLEADING DOES NOT MERIT THIS COURT'S REVIEW.

Petitioners ask this Court to review this case and hold that, although Respondent asserts only a state law claim in this case, because of a procedural ruling by a federal court in another ongoing case, this action arises under federal law for purposes of 28 U.S.C. § 1331. Petitioners argue that Respondent filed this case in state court under state law to avoid the allegedly preclusive effect of the class certification ruling in *Price,* and by doing so, Respondent has somehow transformed his state law claim into a federal claim. While some courts, on authority of *Moitie*, have applied the artful pleading doctrine based on the res judicata effect of a federal judgment, *no* court to Respondents' knowledge has applied the doctrine based on the collateral estoppel effect of a federal procedural ruling. Given this complete absence of judicial precedent, Petitioners' collateral estoppel version of artful pleading does not merit this Court's review. In addition, the petition should be denied because Petitioners' novel approach represents an unsound interpretation of the federal question statute, and Petitioners' policy justifications are inapposite.

A. This Court Should Not Consider A Form Of Artful Pleading That Has Not Been Recognized By Any Court.

No court to Respondent's knowledge has adopted a collateral estoppel form of artful pleading. The four circuit courts that have considered *Moitie*'s footnote 2 have interpreted the footnote narrowly. The Fifth, Seventh and Ninth Circuits have held *Moitie*'s artful pleading doctrine to apply where the state law claim is barred by the res judicata effect of a prior federal judgment. *Brand Name Prescription Drugs*, 123 F.3d at 610-13 (App. 18a-24a); *Rivet*, 108 F.3d at 583-86 & n.36; *Ultramar America, Ltd. v. Dwelle*, 900 F.2d 1412, 1414-17 (9th Cir. 1990). The Second Circuit has held that the *Moitie* artful pleading doctrine applies when the state-court plaintiff previously filed virtually the same claim under federal law in federal court. *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986). Here, it is undisputed that no federal judgment exists that could be res judicata in this case, and that Respondent never brought a federal court action. Thus, none of the four circuit court decisions supports Petitioners' collateral estoppel form of artful pleading.

It is irrelevant that the four courts of appeal have not construed *Moitie*'s footnote 2 identically, and that some courts have professed difficulty understanding the footnote. Petitioners' collateral estoppel argument is not within the parameters of the circuit court debate. As noted above, none of the appeals courts has construed *Moitie* to encompass a collateral estoppel type of artful pleading and none has applied *Moitie* in the expansive manner Petitioners seek. All four courts require a prior federal judgment, which is absent here. Moreover, all four examine the relationship between the prior claim in federal court and the state law claim and require a close relationship. In the Fifth, Seventh and Ninth Circuits, the federal-court claim must be sufficiently similar to the state law claim that the former bars

the latter under res judicata principles. In the Second Circuit, the federal and state claims must be virtually the same. In contrast, under Petitioners' approach, the state and federal court actions need only have a procedural issue in common, and the claims asserted in the two actions can be wholly different.

Any disagreement among the circuits about the meaning of *Moitie* relates to issues not pertinent here. Any such disagreement, therefore, provides no basis for this Court to review this case.

B. Petitioners' Interpretation Of The Federal Question Statute Does Not Merit Further Judicial Consideration Because It Is Contrary To Sound Judicial Policy.

The absence of judicial precedent for a collateral estoppel form of artful pleading is reason enough to deny the petition. But there is an additional reason. The substantial extension of the artful pleading doctrine Petitioners seek would produce anomalous and unsound results in violation of the rule that the federal question statute must be interpreted consistently with reason, coherence and sound judicial policy. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Specifically, under Petitioners' interpretation of the statute:

- The presence or absence of federal question jurisdiction depends on *when* the plaintiff files suit in state court. If he files after the adverse federal ruling, he is deemed to be avoiding that ruling and his case is subject to the jurisdiction of the federal courts. If he commences his state court action before the federal ruling, no such inference can be made and federal question jurisdiction is absent. However, the timing of a lawsuit has no inherent relationship to whether it arises under federal law.

- The presence or absence of federal question jurisdiction depends on the *outcome* of the federal ruling. A ruling favorable to the state-court plaintiff obviously precludes an inference that he is attempting to avoid an adverse federal court ruling. The opposite result, however, permits that inference. There is no logical reason why the particular resolution of a federal issue in one case should determine the removability of another case.

- The existence of federal question jurisdiction could turn on the litigation strategy of the parties in the state case. For example, suppose the plaintiff in the federal case filed an unsuccessful motion in limine to exclude evidence important to the defendants' case. The plaintiff in the state case would create or not create federal question jurisdiction depending on whether he sought to exclude the same evidence. Or in this case, if Respondent were to drop his class action allegations, would his claim be any more or less federal?

- The defendant gets two bites at the preclusion apple. If the defendant persuades the federal court that the adverse federal ruling is collateral estoppel, the federal court will exercise jurisdiction and give the federal ruling preclusive effect. If the defendant fails to so persuade the district court, the case will be remanded to state court for lack of subject matter jurisdiction, the district court's determination that the federal ruling is not collateral estoppel will be a nullity, and the defendant will be able to raise the preclusion issue again in the state court.

- The scope of the doctrine becomes undefined, with no principled way to limit the number or types of federal issues that are sufficient to create federal jurisdiction

> over the state-law case. For example, can a federal decision on the most mundane discovery matter, such as a routine motion to compel, be sufficient to cause the state court action to arise under federal law?

These anomalies and difficulties demonstrate that Petitioners' artful pleading approach is not a sound interpretation of the federal question statute, and thus does not warrant this Court's review.

In addition, Petitioners' expansive interpretation of the artful pleading doctrine is at odds with this Court's "deeply felt and traditional reluctance" to read federal jurisdictional statutes broadly. *Romero*, 358 U.S. at 379.

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Healy v. Ratta, 292 U.S. 263, 270 (1934). For this reason, courts have avoided an expansive application of the artful pleading doctrine. "The artful pleading doctrine is to be invoked only in *exceptional circumstances* as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1427 (9th Cir. 1984) (emphasis added); *see United Jersey Banks v. Parell*, 783 F.2d 360, 368 (3d Cir.), *cert. denied*, 476 U.S. 1170 (1986).

As an unsound and substantial extension of the artful pleading doctrine, Petitioners' approach does not merit further judicial consideration.

C. Because Petitioners' Policy Arguments Are Irrelevant To A Proper Interpretation Of The Removal And Federal Question Statutes, They Furnish No Reason To Grant The Petition.

In support of their request that this Court consider a collateral estoppel version of artful pleading, Petitioners portray their doctrine as a tool for consolidating parallel state and federal litigation, with the purported benefit of promoting fairness and judicial economy and deterring forum shopping. However, this Court is not free to interpret the removal and federal question statutes to promote goals that are not embodied in the statutory language. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Petitioners point to no statutory language or case law suggesting that either statute was written to advance the goals identified by Petitioners. To the contrary, 28 U.S.C. § 1441 "simply does not address issues of judicial economy and litigation management — matters beyond the scope of the statute's language and policy." *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362, 371 (5th Cir. 1995); *accord Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1377 (9th Cir. 1987) ("we are not free 'to implement policies, such as coordination with pending multidistrict litigation, which, though desirable, lie beyond the scope of the removal statute.' "), *cert. denied*, 484 U.S. 850.[1] Petitioners' policy arguments give this Court no reason to grant the petition.

In fact, the issue of whether a prior federal ruling should be protected has no relevance to the jurisdictional question in this

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1. What Petitioners are really complaining about is federalism generally, which permits concurrent, overlapping litigation in state and federal courts. *Carpenter*, 44 F.3d at 371 ("to complain of the costs arising out of concurrent litigation in separate jurisdictions is to complain generally of federalism, which suffers inefficiencies and multiplicity for its own sake").

case. The district court's class certification ruling in *Price* is entitled to the same protection, if any, whether this case goes forward in state or federal court. *Heck v. Humphrey*, 512 U.S. 477, 129 L. Ed. 2d 383, 395 n.9 (1994) ("State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law."). Furthermore, Petitioners' policy concerns are fully accommodated by federal preclusion rules, which *were* developed to promote fairness, deter forum shopping and avoid inconsistent rulings. *Montana v. United States*, 440 U.S. 147, 153-54 (1979) ("to preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.").

In any event, Petitioners' policy arguments are not persuasive because they are based on an unwarranted mistrust of state courts. Petitioners' suggestion that all sorts of evils (such as forum shopping and relitigation of decided issues) will occur if this case and others like it are not litigated in federal court is unfair to the Alabama courts and their sister courts in other states. As this Court observed over 40 years ago:

> The assumption upon which the argument proceeds is that federal rights will not be adequately protected in state courts. . . . But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the

> procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 [the Anti-injunction Act] is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.

Amalgamated Clothing Workers v. Richman Brothers Co., 348 U.S. 511, 518 (1955). Accordingly, this Court presumes state courts to be competent to decide federal issues. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988).

In sum, Petitioners' policy arguments are irrelevant and unpersuasive and do not create a reviewable issue.

III.

PETITIONERS' ALTERNATIVE ARTFUL PLEADING ARGUMENT DOES NOT WARRANT SUPREME COURT REVIEW.

Petitioners also ask this Court to consider an alternative interpretation of *Moitie*'s footnote 2. Based on *Moitie*, Petitioners argue that Respondent's antitrust claim, though it was brought under state antitrust law, necessarily arises under federal antitrust law. According to Petitioners, conspiracies involving interstate commerce, such as the one alleged in this case, can be redressed only under federal antitrust law, not under Alabama antitrust law.

This approach to artful pleading, which would require removal courts to determine whether state law provides a cause of action, does not warrant this Court's review. No appellate court has interpreted *Moitie* in this way, and the district court

decisions on which Petitioners rely are inconsistent with this Court's artful pleading analysis and conflict with *California v. ARC America Corp.*, 490 U.S. 93 (1989). Moreover, Respondent has no federal antitrust claim to support federal question jurisdiction, and Petitioners' alternative construction of the federal question statute is not sound.

A. The Petition Should Be Denied Because No Appellate Court Has Accepted Petitioners' Alternative Interpretation of *Moitie*.

None of the four circuit courts to address the meaning of *Moitie*'s footnote 2 has interpreted it as Petitioners do for their alternative argument. In particular, the question of whether state law provides a cause of action for the conduct at issue is not an element of the artful pleading analysis of any of these courts. The absence of any appellate court support for Petitioners' alternative interpretation of *Moitie* strongly indicates that Supreme Court review is not warranted.

B. Because Petitioners Seek To Expand The Artful Pleading Doctrine Far Beyond The Limited Scope Recognized By This Court, The Petition Should Be Denied.

Petitioners' alternative argument should not be considered by this Court, moreover, because it is far removed from the artful pleading framework established by this Court. Consistent with the sparing use this Court has made of the artful pleading doctrine, the Court, in a post-*Moitie* decision, stated:

> Although "occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization, . . . most of them *correctly* confine this practice to areas of the law pre-empted by federal substantive law".

Caterpillar, Inc. v. Williams, 482 U.S. 386, 397 n.11 (1987) (emphasis added) (*quoting Moitie*, 452 U.S. at 410 n.6 (Brennan, J., dissenting)). *Caterpillar* states this Court's view that the artful pleading doctrine should be confined to situations where federal law completely preempts state law. It is undisputed that this is not a complete preemption case. *ARC America*, 490 U.S. at 101.

Even if *Moitie* is interpreted more broadly than warranted under *Caterpillar*, Petitioners' alternative argument would still represent a marked departure from this Court's artful pleading analysis. Under the artful pleading doctrine as applied by this Court, a state law claim may be converted into a federal claim because of the preemptive effect of a federal claim, *Caterpillar*, 482 U.S. at 393-94, or arguably because of the preclusive effect of a federal judgment, *Moitie*, 452 U.S. at 397 n.2. Thus, the essential elements of artful pleading under a generous view of this Court's decisions are: (1) the existence of a federal claim or federal judgment; and (2) the preemptive or preclusive effect of the federal claim or federal judgment on the artfully-pled state law claim. It is the force of the federal claim or federal judgment (through preemption or preclusion) that transforms the state law claim into a federal one. Here, however, Petitioners seek to convert Respondent's state antitrust claim into a federal claim because, in Petitioners' view, Respondent's claim is not valid under *state law*. Petitioners' approach is a far cry from this Court's artful pleading analysis and, accordingly, does not merit Supreme Court consideration.

C. The Petition Should Be Denied Because It Relies On District Court Cases That Conflict With *ARC America*.

The district court decisions on which Petitioners rely for their alternative argument conflict with *ARC America*. Petitioners' cases assert that anticompetitive activity involving interstate commerce is only actionable under the federal antitrust

laws. This conclusion rests on the premise that a neat dichotomy exists between the scope of state and federal antitrust laws. According to Petitioners' cases, federal antitrust law solely and exclusively governs interstate commerce, while state antitrust law solely and exclusively governs intrastate commerce. Contrary to the view of these cases, the respective spheres of state and federal antitrust law overlap, as this Court made clear in *ARC America*.

The plaintiffs in *ARC America* included both direct and indirect purchasers of cement in different states around the country who alleged a nationwide price-fixing conspiracy in violation of federal and state antitrust laws, including the Alabama antitrust statute. In holding that the federal antitrust laws do not preempt their state counterparts, this Court recognized that state antitrust laws impose liability "in addition to that imposed by federal law." 490 U.S. at 105. As a matter of logic, state and federal antitrust liability can be cumulative only if they arise from the same wrongdoing (*e.g.*, in *ARC America*, from the same nationwide conspiracy). Thus, *ARC America* recognized that state and federal antitrust laws are not mutually exclusive and that both can be applied to remedy the same nationwide conspiracy. Indeed, if federal and state antitrust laws operated in mutually exclusive spheres as Petitioners contend, the preemption issue addressed in *ARC America* could not have arisen. Because the premise of Petitioners' artful pleading cases, *e.g.*, *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980), conflicts with *ARC America*, Petitioners' cases furnish no reason for this Court to review this case.

D. The Petition Should Be Denied Because Respondent Has No Federal Antitrust Claim On Which To Base Federal Question Jurisdiction.

As an indirect purchaser of Petitioners' prescription drugs, Respondent is without a claim under the federal antitrust laws. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Thus,

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> [i]t would be incongruous . . . to construe these state law consumer class claims as arising under federal law when, under federal law as announced in *Illinois Brick*, it would appear that they never arose at all.

In re Sugar Antitrust Litig., 588 F.2d 1270, 1273 (9th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *see Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 26 (1983) (holding that the State of California's claim did not arise under ERISA because, among other reasons, "ERISA does not provide an alternative cause of action in favor of the State to enforce its rights"). Petitioners are plainly wrong to assert that Respondent's claim arises under federal antitrust law. Because Petitioners' alternative artful pleading argument is fundamentally flawed for this reason, it does not present an important question for this Court's review.

E. Petitioners' Alternative Argument Is Not A Sound Interpretation Of The Federal Question Statute.

Like Petitioners' collateral estoppel version of artful pleading, their alternative version is not sound and, therefore, does not merit further judicial review. Under Petitioners' alternative theory:

- The presence or absence of removal jurisdiction depends on whether a parallel case is pending in federal court and the order in which the state and federal cases are filed. If the state case is the first or only one filed, federal question jurisdiction does not lie. If a parallel federal case is also filed and it is filed first, federal question jurisdiction exists. However, there is no logical reason to interpret 28 U.S.C. § 1331 to make federal court jurisdiction turn on the existence of parallel federal litigation or the sequence in which federal and state cases are commenced.

- Defendants get two chances to defeat the state law claim on the pleadings. Their first is in federal court in opposition to a remand motion. If unsuccessful there, their second chance is a motion to dismiss in state court after remand. This Court should not consider an approach that unfairly results in multiple opportunities to dismiss a state law claim on the pleadings.

- Removal courts, in determining whether federal question jurisdiction exists, must pass on the validity of the state law claim as a matter of state law. Thus, they must reach the merits of the case before they have ascertained whether they have jurisdiction. This they cannot do. *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action for which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

These difficulties inherent in Petitioners' alternative artful pleading argument provide an additional reason for this Court not to review this case.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM *RIVET* PETITION

No. 96-1971

In The

Supreme Court of the United States

October Term, 1996

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FOUNTAINBLEAU STORAGE ASSOCIATES,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Appendix A

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Appendix A

QUESTIONS PRESENTED

(1) Does this Court's holding in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981), permit removal of a state court controversy involving mortgage rights in real property, solely on the basis that the defendants intended to assert the affirmative defense of claim preclusion based on a prior federal judgment, where the Petitioners had not filed the prior federal action and had no conceivable claim which might have been brought in federal court?

(2) May a United States District Court reach a decision on the merits of a controversy prior to ascertaining whether federal jurisdiction over the controversy exists, and then use the decision on the merits to justify a decision to invoke jurisdiction over the controversy?